

2010 WL 8591042 (Cal.Superior) (Trial Motion, Memorandum and Affidavit)
Superior Court of California,
Southwest District.
Los Angeles County

Lloyd Stanley FOUNTAIN, an individual, Plaintiff,

v.

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA, a corporation, R.A. Lotter
Insurance Marketing Inc. dba the Lotter Group, and Does 1 through 50, inclusive, Defendants.

No. YC057519.
September 23, 2010.

**Defendant R.A. lotter Insurance Marketing Inc. dba the Lotter Group's
Memorandum of Points and Authorities in Support of Motion for New Trial**

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Honorable [Morris Jones](#).

Department D

[Filed with Declaration of Ruben Tarango in Support; Notice of Lodgment]

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Defendant R. A. LOTTER INSURANCE MARKETING INC., dba, THE LOTTER GROUP (herein “defendant”) moves for anew trial regarding the jury’s verdict finding **Financial Elder Abuse** and award of damages on the grounds set forth in defendant’s Notice of Intention to Move for New Trial filed on September 15, 2010 including the following:

- (1) The Special Verdict Form erroneously included “undue influence” as an element of the **Financial Elder Abuse** claim which was the only cause of action the jury rendered in favor of plaintiff and against defendant.
- (2) It was an instructional error resulting in prejudice to defendant to instruct the jury that “undue influence” was an element of **Financial Elder Abuse** and to instruct the jury regarding the definition of “undue influence.” The instructional error led to the unfounded finding of a **Financial Elder Abuse**.
- (3) There was insufficient evidence to support the jury's verdict. The weight of the evidence did not support the finding of **Financial Elder Abuse**.
- (4) The jury's award of \$212,450 in damages was excessive and was based upon speculation, not evidence.

The trial in the underlying matter commenced on August 10, 2010. (NOL Ex. ZZ.) On August 18, 2010, the jury returned a verdict in favor of plaintiff on the single cause of action for **Financial Elder Abuse**. (NOL Ex. ZZ.) The jury found in favor of defendant on all other causes of action. Defendant filed a motion for judgment notwithstanding the verdict and also at that time, filed its Notice of Intention to Move for a New Trial.

New trial should be granted because the evidence in the record does not support a finding of liability on any theory. Additionally, errors occurred in the instruction to the jury regarding the law and on the Special Verdict Form. (NOL, Exhibits B. ZZ, AAA, BBB.) Such errors undoubtably prejudiced the defendant and resulted in a miscarriage of justice.

II. A NEW TRIAL IS WARRANTED AND NECESSARY

[Code of Civil Procedure section 657](#) provides in pertinent part, “[t]he verdict may be vacated ... and a new or further trial granted on all or part of the issues, on the application of the party aggrieved ...” ([Code Civ. Proc., § 657](#).) A motion for new trial permits the trial court to reexamine any issue of fact or law. (see [Carney v Simmond](#) (1957) 49 Cal.2d 84, 90.) The court acts as the “thirteenth juror.” ([Norden v. Hartman](#) (1952) 111 Cal.App.2d 751, 758.) “When a new trial is granted, the presumption is in favor of the order granting the new trial and against the judgment.” ([Tice v. Kaiser Co.](#) (1951) 102 Cal.App.2d 44, 46.) This court not only has the right but the *duty* to grant a motion for new trial when it believes the weight of the evidence is contrary to the finding of the jury. (*Ibid.*) The purpose of a motion for new trial, in part, is to allow this court to reexamine issues of fact ([Fountain Valley Chateau Blanc Homeowner's Assn v. Dept of Veterans Affairs](#) (1998) 67 Cal.App.4th 743, 751.) In granting a motion for new trial, this court may draw inferences and resolve conflicts in the evidence different than that of the jury. A motion for new trial allows the trial judge “to disbelieve witnesses, reweigh evidence and draw reasonable inferences contrary to that of the jury.” (*Ibid.*) The power of the judge to do justice by ordering a new trial is not impaired even though the moving party is technically estopped to claim error or has waived his right to complain. ([Shaw v Pacific Greyhound Lines](#) (1958) 50 Cal.2d 153, 159.)

Here, the evidence received at trial was insufficient as a matter of law to support the jury's verdict rendering judgment against defendant for **Financial Elder Abuse**. (NOL Exhibits C-YY.) The weight of the evidence was against the plaintiff. Additionally, it was a error of law resulting in prejudice to defendant for the court to instruct the jury that “undue influence” was an element of **Financial Elder Abuse** and for the court to include “undue influence” on the Special Verdict Form because “undue influence” was not part of the statutory scheme at the time the incident occurred. (NOL Exhibits A, B, ZZ, AAA, BBB.) Lastly, the jury's award of \$212,450 in economic damages was excessive and was based on speculation and not evidence. (NOL Exhibit ZZ, Minutes 8/18/10.)

III. THE REFERENCE TO “UNDUE INFLUENCE” ON THE SPECIAL VERDICT FORM WAS AN ERROR OF THE LAW AND AN IRREGULARITY IN THE PROCEEDINGS RESULTING IN A MISCARRIAGE OF JUSTICE

In this matter, plaintiff alleges **Financial Elder Abuse** under [Welfare & Institutions Code sections 15610.07\(a\), 15610.30\(a\), and 15657.01](#) arising out of the purchase of two annuities and a life insurance policy from defendant. The jury found for plaintiff on the **Financial Elder Abuse** claim. (NOL Exhibits A, B, ZZ, Minutes 8/18/10.)

The **Elder Abuse** Act is governed by [Welfare & Institutions Code section 15600](#). Its purpose is to protect a particularly vulnerable portion of the population from gross mistreatment in the form of **abuse** and custodial neglect. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33; *Estate of Lowrie* (2004) 118 Cal.App.4th 220, 226.) In 2008, the Legislature amended the section of the Welfare and Institutions Code which defines **financial abuse** constituting a material change in the statutory definition of **financial abuse**. (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 736-737.) The amendments did not become effective until January 1, 2009. (*Id.*) As the 2008 amendments to the statutory scheme were substantive, rather than procedural, and the Legislature did not state that the amendments were retroactive in effect, they are inapplicable to plaintiff's claims in the present matter. (See *Id.*, in which the court determined that substantive amendments to **elder abuse** statute were not retroactive in effect, absent a clear expression of legislative intent.) It is important to note that the *Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727 matter was published less than a month before the trial in this matter.

The **Elder Abuse** and Dependent Adult Civil Protection Act of 1991 ([Welf & Inst. Code, § 15600, et. seq.](#)) (**Elder Abuse** Act), provided, in relevant part, that “‘[f]inancial abuse’ of an **elder**” occurred when a person either took, secreted, appropriated, or retained, or assisted in taking, secreting, appropriating, or retaining real property of an **elder** “for a wrongful use.” (Former Welf & Inst. Code, § 15610.30, subd. (a)(1), (2); Stats. 2000, ch. 442, § 5; see also Stats. 2000, ch. 813, § 3). A “wrongful use” was defined as acting “in bad faith,” in that the **abuser** “knew or should have known that the **elder** ... had the right to have the property transferred or made readily available to the **elder** or to his or her representative.” (Former Welf. & Inst. Code, § 15610.30, subd. (b)(1).)

Thus, according to the former **Elder Abuse** Act that was in effect at the time of the incident, plaintiff was required to show that defendant took, secreted, appropriated, or retained “real or personal property of an **elder** or dependent adult to a *wrongful use* or *with intent to defraud*, or both.” (Former Welf. & Inst. Code, § 15610.030 (a), emphasis added; see also Defendant's Trial Brief NOL Ex. DDD, pp. 20-21.) Here, the allegations involve defendant's sales of annuity contracts and life insurance policies and its receipt of commissions from the sales. The trial evidence established that on or about *December 2, 2005*, plaintiff, then age 75, purchased two Allianz MasterDex 5 deferred annuities from defendant. (Tarango Decl., ¶ 4; see also NOL Exhibits H, P, Q, R.) Nearly two years later, plaintiff purchased a life insurance policy from defendant and on *July 10, 2007* acknowledged receipt of his purchased life insurance policy. (NOL Exhibits W, FF, GG, HH.)

The **Elder Abuse** Act in effect at the time of the purchase of the annuities, 2005, and at the time of the purchase of the life insurance policy, 2007, at issue in the present lawsuit *did not* include any reference to “undue influence.” (See NOL Ex. DDD, pp. 20-21.) Nevertheless, the Special Verdict Form in the present matter specifically included a reference to “undue influence.” (NOL Ex. B.)

Here, the statement of the issues on the Special Verdict Form that the jury was asked to decide was erroneous. Pursuant to [Code of Civil Procedure section 657](#), a verdict may be vacated and a new trial granted on all or parts of the issues if an irregularity in the proceedings prevented the defendant from having a fair trial or an error in law occurred. ([Code Civ. Proc., § 657](#), subds. (1) and (7).) Failure to object to a defective verdict does not preclude right to raise the issue on a motion for a new trial. (See *Campbell v Zokelt* (1969) 272 Cal.App.2d 315, 320; see also *Shaw v. Pacific Greyhound Lines, supra*, 50 Cal.2d at p. 159.) A trial court has a duty to protect the parties from unjust verdicts. (*Blake v. E. Thompson Petroleum Repair, Co., Inc.* (1985) 170 Cal.App.3d 823, 834.)

Further, when a new trial is granted based on an erroneous or misleading jury instruction, the order “will not be disturbed unless the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury.” (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1123.) The same rules apply when a new trial is granted based on an erroneous or misleading special verdict question. (*Id.*) “Such a question has the same potential to misguide the jury and result in a miscarriage of justice as an erroneous or misleading jury instruction.” (*Id.*) Therefore, “the trial court must consider the special verdict form and jury instructions as a whole, and the particular circumstances of the case, and decide whether the question was erroneous or misleading and, if so, whether the defect ‘materially affect[ed] the substantial rights of the party moving for a new trial.’ ” (*Id.*)

The error on the Special Verdict Form materially affected the substantial rights of defendant, because nine jurors returned a verdict finding the erroneous elements of **Financial Elder Abuse** as stated on the Special Verdict Form satisfied. The Special Verdict Form included an erroneous theory of law. (NOL Exhibits B, ZZ.) Now is the time for the trial court to do justice and to correct this error. As a matter of law, the jury could not and should not have found **elder abuse** based upon the issue of “undue influence.” (Former Welf. & Inst. Code, § 15610.030.) As such, a new trial as to the **Financial Elder Abuse** claim is necessary and warranted.

IV. THE JURY WAS ERRONEOUSLY INSTRUCTED REGARDING “UNDUE INFLUENCE”

The jury in this case was instructed as to the definition of “undue influence” and that an essential factual element of **financial abuse** included “undue influence.” (NOL, Exhibits AAA, BBB.)

A trial court has a duty to instruct the jury on controlling legal principles. (*Blake v. E. Thompson Petroleum Repair, Co., Inc.* (1985) 170 Cal.App.3d 823, 834.) The purpose of the jury instructions is to state the law. (*Sexton v. Brooks* (1952) 39 Cal.2d 153, 158.) Code of Civil Procedure section 647 provides that instructional errors are not waived. (Code Civ. Proc., § 647; see also *Shaw v. Pacific Greyhound Lines, supra*, 50 Cal.2d at p. 159.) An error from an erroneous and misleading instruction is not waived by the failure to request an instruction which correctly states the law. (See *Tabata v Murane* (1944) 24 Cal.2d 221, 227-228.) An error in instructing the jury is challengeable as an “error in law” under Code of Civil Procedure section 657, subd. (7) and is a basis for a new trial if the error was prejudicial. (Code Civ. Proc., § 657, subd. (7).) Further, a new trial may be granted for irregularity in the proceedings of the court, jury, or adverse party, or be based on any court order or **abuse** of discretion that prevented a party from having a fair trial. (Code Civ. Proc., § 657, subd. (1).)

With respect to an appellate court's review of the issues relating to improper jury instructions and the question of their prejudicial impact, an appellate court must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to defendants and rendered a verdict in their favor on the issues as to which it was misinstructed. (*Barber v. Rancho Mortgage & Investment Corp.* (1994) 26 Cal.App.4th 1819, 1833.) “Where it seems probable that the jury's verdict may have been based on the erroneous instruction, prejudice appears, and this court should not speculate upon the basis of the verdict” (*Vistica v Presbyterian Hosp. & Med. Center, Inc.* (1967) 67 Cal.2d 465, 471.) Similarly, the trial court may not speculate upon the basis of the verdict, but should grant new trial when it appears an erroneous instruction resulted in a miscarriage of justice.

Instructional error gives rise to a new trial if after examination of the entire case, the error resulted in a miscarriage of justice (Cal. Const. Art VI, § 13) and that a different result was probable if that instruction had not been given. (See Code Civ. Proc., § 475.) Jury instructions that do not accurately state the law constitute grounds for reversal if they create prejudice. (*Sexton v. Brooks* (1952) 39 Cal.2d 153, 154; *Osborn v Mission Ready Mix* (1990) 224 Cal.App.3d 104, 115.) The prejudicial effect of an erroneous jury instruction is determined by “no precise formula.” (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1054.) The following five factors are used in determining the prejudicial effect of an instructional error: (1) the degree of conflict in the evidence on the critical issue; (2) whether the jury asked for a rereading of the erroneous jury instruction or of related evidence; (3) the closeness of the jury verdict; (4) whether closing argument contributed to the instruction's misleading effect; and (5) the effect of other instructions in remedying the error. (*Id.*, at p. 1054-1055.)

Here, the purpose of instructing the jury was frustrated by the fact that the jury was not properly instructed as to the correct law. (NOL Exhibits ZZ, AAA, BBB.) As reflected by the minutes of the court, the degree of conflict in the evidence regarding misconduct on the part of defendant was great and it was a close jury verdict. (NOL Ex. ZZ.) The jurors determined there was insufficient evidence to support any fraud, concealment, or conduct warranting punitive damages. (NOL Ex. B.) However, nine of the twelve jurors rendered a verdict in favor of plaintiff on the single cause of action for **Financial Elder Abuse**. (NOL Ex. B.) Undoubtably, the erroneous jury instruction regarding **Financial Adult Abuse** had significant consequence.

Because of this erroneous jury instruction, defendant was prevented from having a fair trial. (NOL AAA-CCC.) Due to the erroneous jury instruction, the jury was misinformed regarding the law. Therefore, a new trial is warranted because the erroneous jury instruction mislead the jury as to the correct law. Therefore, prejudice is present warranting a new trial. (See *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670.)

V. A FINDING OF **FINANCIAL ELDER ABUSE UNDER THE **ELDER ABUSE** STATUTE BEFORE THE 2008 AMENDMENTS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

Under [Code of Civil Procedure section 657](#) subdivision (6), a motion for new trial may be granted on the grounds that insufficiency of the evidence to justify the verdict. ([Code Civ. Proc., § 657](#), subd. (6).) It is the duty of the trial judge to grant a new trial when he believes that the weight of the evidence to be contrary to the finding of the jury. (*ice v. Kaiser Co.* (1951) 102 Cal.App.2d 44, 46.) If any appreciable conflict exists in the evidence, the trial court's act will not be disturbed upon appeal. (*Id.*) Here, the evidence presented at the time of trial does not support a conclusion that defendant was liable for **Financial Elder Abuse** under the statutory provision in effect at the time of the alleged incident(s).

According to the former Welfare & Institutions Code section 15610.30, to prove **Financial Elder Abuse** plaintiff was required to prove with substantial evidence: (1) that defendant took, secreted, appropriated, retained or assisted in taking, secreting, appropriating, or retaining real or personal property of plaintiff, and (2) that said conduct was for a wrongful use and/or with the intent to defraud. (Former Welf. & Inst. Code, § 15610.030.)

Here, the evidence at trial showed that plaintiff purchased two annuities contracts from defendant then returned two years later and purchased a life insurance policy. (Tarango Decl., 4; see also NOL Exhibits H, O, P, Q, R, W, FF, GG, HH.) At issue is whether defendant committed **financial abuse** by selling plaintiff the two annuities and life insurance policy. However, the evidence at trial established that no **abuse** occurred. Rather, plaintiff changed his mind regarding the purchase of the life insurance policy seven months after the purchase and sought to rescind the contract. (Tarango Decl., ¶¶ 13 & 14.) Plaintiff claimed to be a victim of **Financial Elder Abuse** because he experienced buyer's remorse after the period to rescind the contract expired knowing he was locked into a valid and enforceable agreement.

During the trial, plaintiff failed to prove that defendant engaged in any misconduct constituting **Financial Elder Abuse**. There was no substantial evidence establishing that defendant's conduct directed at plaintiff was for a *wrongful use* and/or *with the intent to defraud*

A. There was No Substantial Evidence of Taking, Secreting, Appropriating, or Retaining Real or Personal Property of Plaintiff for a Wrongful Use

Prior to purchasing the annuities at issue, plaintiff understood that he had a “free-look” 30-day trial period in case he changed his mind about the annuities. (NOL Ex. I.) During the free trial period, plaintiff did not change his mind about the ownership of the annuities and actually still owns them today.¹ (Tarango Decl., ¶ 37.) As a result of the purchase of the Allianz annuities, plaintiff received a 5% bonus. (Tarango Decl., ¶ 4; NOL Ex. L.)

Nearly two years after his purchase of the Allianz annuities, plaintiff purchased an Allianz GenDex II life insurance policy based on the principles outlined in the book *Missed Fortune 101* by Douglas R. Andrew, which outlined an investment strategy wherein the investor uses equity built up in real estate properties to use fund and purchase investment grade life insurance policies. (Tarango Decl., ¶¶ 5, 6, 21, 23, 31; NOL Exhibits V, AA, BB, EE.) Upon delivery of the life insurance policy, plaintiff had a 30-day free trial period in case he changed his mind about the policy. (NOL Ex. LL.) He did not exercise the option within the 30 days. (NOL, Ex. LL.) Plaintiff was aware that there was no guaranteed return on the insurance policy. (Tarango Decl., ¶ 12.)

The evidence established that prior to the sales of both the subject annuities and the life insurance policy, defendant provided plaintiff with all disclosure forms including disclosure of the contract length, the accumulation value, the cash surrender value, the penalties associated with early surrender/withdraw, cancellation of the contract, loans on the policy etc. (Tarango Decl., ¶¶ 6, 12, 24, 25, 31, see also NOL Exhibits I, P, Q, R, T, Y, AA, BB, EE, GG, HH.) Plaintiff was additionally asked to complete a product suitability form to ensure that his investment purchases lined up with his investment goals. (NOL Exhibits F, G, H.) The disclosures accompanying the annuity and life insurance applications clearly set forth the terms, conditions, and commitments that would be required should plaintiff proceed with the purchases. Plaintiff authenticated the disclosure documents related to the purchase of the annuities. (Tarango Decl., ¶¶ 6, 12, 24, 25, 31.) He understood the terms and conditions of the annuities. (Tarango Decl., ¶ 25.) Plaintiff also explained that he was familiar with annuities based upon his previous purchase of other annuities. (Tarango Decl., ¶ 25.) Plaintiff signed a statement of understanding for each purchase and separately acknowledged Defendant's disclosure and recommendation to consult with legal and tax professionals regarding the full impact of his intended purchases. (NOL Exhibits I, HH; see also Tarango Decl., ¶¶ 26, 31, 34, 41, 42, 50, 52; NOL Ex.N.)

Prior to the sales, defendant met with plaintiff, listened to plaintiff's investment goals, suggested products defendant sold and provided information to plaintiff regarding those products. (Tarango Decl., ¶¶ 6, 24, 25, 26, 40, 41, 42; see also NOL Exhibits J, K, M, S, T, X, Y.) In fact, defendant met with plaintiff several times and presented a variety of proposals to plaintiff for review and discussion. (Tarango Decl., ¶¶ 6, 24, 25, 26, 31, 40, 41, 42; see also NOL Exhibits CC, DD.)

Regarding the life insurance policy, plaintiff testified that he reviewed and authenticated the documents related to the purchase of the life insurance policy including multiple illustrations reflecting changes made by plaintiff regarding the amount of coverage, premium amount, length of term, etc. (Tarango Decl., ¶ 31.) Plaintiff acknowledged that, in purchasing the life insurance policy, he desired to work the plan set forth in the book *Missed Fortune 101* and to meet his financial goals. (Tarango Decl., ¶¶ 23, 31.)

When plaintiff elected go forward with the annuity and life insurance contracts, defendant received a commission on the sale of the annuities and life insurance policies.² (Tarango Decl., ¶¶ 16, 43, 49, 52.) Detailed documentation confirmed plaintiff's ownership of the items he purchased. Plaintiff received the benefits of these transactions pursuant to the terms of the contracts which plaintiff knowingly entered into. However, in December 2007, a full seven months after the purchase of the life insurance policy, plaintiff sought to cancel his insurance policy and to recover the premium less fees. (Tarango Decl., ¶¶ 13, 14, 15, 43.) Plaintiff wrote a letter dated *December 20, 2007* to Allianz regarding his effort seeking cancellation of the insurance policy, stating "I thought I could work this plan, but I now realize I should not have tried." (NOL Exhibits LL, NN, PP, RR, UU; see also Tarango Decl., ¶ 14.) Prior to this letter, plaintiff never raised any concerns regarding the 2005 annuities purchase or the 2007 life insurance purchase. (Tarango Decl., ¶¶ 37, 38, 44; NOL Ex. KK.)

Based on the evidence presented at trial, there was no violation of the Elder Abuse Act by Defendant. The conduct of defendant was lawful and did not fall within the Elder Abuse Act.³ The legislature never intended the Elder Abuse Act to cover the lawful transactions that occurred in the present matter. There was no wrongful use of plaintiff's property. Plaintiff received the annuities and insurance policy for which he paid. (Tarango Decl., ¶¶ 4, 6, 42; NOL Exhibits O, P, Q, R, FF, GG.) Plaintiff was made aware of the terms of the contracts and knowingly entered into such contracts. (NOL Exhibits I, HH.) Further, the commissions received by defendant for the sales were within the industry standard. (Tarango Decl., ¶¶ 49, 52.)

B. There was No Substantial Evidence of Taking, Secreting, Appropriating, or Retaining Real or Personal Property of Plaintiff With the Intent to Defraud

There was no substantial evidence of any intent by defendant to defraud the plaintiff. Lisa Brumfield testified that she believed plaintiff understood the working of the annuities and insurance policy. (Tarango Decl., ¶ 44.) She also testified that she considered plaintiff her friend and wanted to do whatever she could to help him. (Tarango Decl., ¶ 45.) She took plaintiff's concerns seriously and wanted to do the best she could to address his concerns. (Tarango Decl., 45.) Plaintiff presented no substantial evidence of an intent to defraud plaintiff. In fact, the jurors determined that defendant was not guilty of intentional fraud or concealment. (See NOL Exhibits B, ZZ.) Here, there was insufficient evidence to support a verdict of **Financial Elder Abuse** based on the statute in effect prior to the 2008 amendments.

VI. A FINDING OF **FINANCIAL ELDER ABUSE UNDER THE 2008 REVISED STATUTE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

Under the recent amendments to the **Financial Elder Abuse** statute, the Legislature added “undue influence” to **Elder Abuse** Act pertaining to **financial abuse**. (Welf. & Inst. Code, § 15610.030.) Additionally, under the amendments, a person or entity shall be deemed to have “taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity *knew or should have known that this conduct is likely to be harmful* to the **elder** or dependent adult.” (Welf. & Inst. Code, § 15610.30 (b), emphasis added.) **Civil Code section 1575** provides that “undue influence” consists: (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or, (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress. (Civ. Code, § 1575.)

During the trial, plaintiff made numerous admissions regarding his expertise, knowledge and sophistication when it came to his investments and managing his assets. (Tarango Decl., ¶¶ 3, 4, 6, 17, 18, 21, 22, 23, 25, 26, 27, 30, 49, 50, 51, 52.) Plaintiff has significant prior investment experience in a variety of investment products including real estate, stocks, bonds, mutual funds, and annuities. (*Id.*) Plaintiff was familiar with complex investment strategies and mortgages. (Tarango Decl., ¶¶ 3, 17, 18, 22, 30.) He also testified that he had **financial** advisors or stockbrokers assisting him from a young age, that he earned approximately \$200,000 a year from his rental income, and that he made significant investment decisions on his own. (Tarango Decl., ¶¶ 3, 17, 18, 22, 30.) Since retirement, plaintiff spent a significant amount of time studying the markets, attending numerous **financial** planning seminars, and meeting with various insurance brokers, estate planners, and **financial** planners to obtain advice and information regarding his investments. (Tarango Decl., ¶¶ 3, 30.) The evidence at trial established that plaintiff was experienced in annuities, real estate transactions and mortgages. (Tarango Decl., ¶¶ 17, 18, 25, 50, 51.)

Further, prior to his purchase of the life insurance policy, he reviewed other policies and consulted with other professionals regarding life insurance policies. (Tarango Decl., ¶¶ 6, 51.) Witness Bruce Byrwa, a mortgage broker who conducted business with plaintiff, testified that plaintiff was a sophisticated client who was well educated about his **finances** and mortgages in particular. (Tarango Decl., ¶ 50.) Likewise, witness John Reeve, a **financial** planner, testified that plaintiff consulted with him in 2005 regarding purchasing a \$4 million life insurance policy. (Tarango Decl., ¶¶ 6, 27, 51.) This was almost two years before plaintiff bought the life insurance policy from defendant. (Tarango Decl., ¶ 5.) Mr. Reeve testified that plaintiff was a sophisticated investor and Mr. Reeve's testimony establishes that plaintiff was not inexperienced or naive regarding life insurance policies. (Tarango Decl., ¶ 51.)

Plaintiff testified that at certain times, he was getting advice from two or more advisors at the same time and “shopping” their various proposals. (Tarango Decl., ¶¶ 22, 23, 30.) At the same time he was meeting with defendant regarding the life insurance policy, he was meeting with Mr. Much regarding a different life insurance product. (Tarango Decl., ¶ 23.) Plaintiff believed that life insurance policy defendant was proposing was the appropriate policy to follow the plan set forth in the Missed Fortune

101 book. (Tarango Decl., ¶ 23.) Therefore, after considering the different life insurance policies presented by Mr. Much and defendant, plaintiff decided to go with defendant's proposal. (*Id.*)

As of May 2007, plaintiff's real investments were worth approximately \$5.2 million. Plaintiff also had approximately \$400,000 in stock/bonds and \$450,000 in annuities. (See NOL Ex. U.) He had about \$400,000 in mortgages. (*Id.*; see also NOL Ex. Z.) Altogether, his net worth was just under \$6 million which was diversified along a variety of investments opportunities. (See NOL Ex. U.) The evidence established that he was not a financially struggling senior citizen.

There was no evidence at the time of trial that defendant exerted any confidence or authority over plaintiff for the purpose of obtaining an unfair advantage over him.⁴ The jurors determined that defendant was not guilty of intentional fraud or concealment. (Exhibit B, Special Verdict Form.) Additionally, there was no evidence of plaintiff having a weakness of mind. Further, there was no evidence of any grossly oppressive and unfair advantage by defendant of plaintiff's necessities or that plaintiff was in type of distress at the time of the transactions at issue. Plaintiff was a savvy investor with a experience in annuities and knowledge of life insurance transactions. (Tarango Decl., ¶¶ 4, 6, 18, 18, 22, 23, 27, 51, 52.) There was no substantial evidence presented during the trial to establish that defendant knew or should have known that its conduct was likely to be harmful to plaintiff

Here, there was no conduct by defendant amounting the financial abuse as defined by the amendments to the Financial Abuse statute. Clearly, in light of the testimony and evidence presented at the time of trial, there was no substantial evidence of taking, secreting, appropriating, obtaining, or retaining real or personal property of plaintiff by "undue influence." Therefore, there was insufficient evidence to support a judgment against defendant on the Financial Elder Abuse claim even under the revised Elder Abuse Act statute governing financial abuse effective after the alleged acts of wrongful conduct in this matter.

VII. THERE WAS NO SUBSTANTIAL EVIDENCE THAT DEFENDANT'S CONDUCT WAS A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF HARM

The court can set aside a verdict not warranted by the evidence. (Code Civ. Proc., § 657; see also *Valdez v J.D Diffenbaugh Co.* (1975) 51 Cal.App.3d 494, 512.)

The evidence at the time of trial showed that plaintiff did not suffer any harm as a result of the purchase of the Allianz annuities. After consulting with an independent mortgage broker, plaintiff decided to fund the premiums of his life insurance policy purchased from defendant by taking out a mortgage on one of plaintiff's properties. (Tarango Decl., ¶¶ 34, 42.) Plaintiff obtained the 552,000 mortgage and paid approximately \$100,000 of interest on the loan. (Tarango Decl., ¶¶ 7, 10, 11, 19; see NOL Exhibits JJ, XX, YY, WW.) Plaintiff's alleged harm related to the purchase of the life insurance policy was caused by his decision to mortgage his apartment project and put the equity to better use versus using his other assets or cash to finance the purchase, not by any alleged misconduct on the part of the defendant. (See Tarango Decl., ¶¶ 6, 10, 12, 13, 17, 21, 23, 34, 42.)

Therefore, there was insufficient evidence to support a judgment against defendant on the Financial Elder Abuse claim because the evidence presented at the time of trial was insufficient to establish that the defendant's conduct was a substantial factor in causing plaintiff's alleged harm. Therefore, a new trial is warranted.

VIII. EXCESSIVE DAMAGES WERE AWARDED BY THE JURY

Another ground for a new trial is an award of excessive damages. (Code Civ. Proc., §§ 662.5 & 657 subd. (5).) In determining whether excessive damages were awarded, the court weighs the evidence (*Handleman v. Victor Equipment Co.* (1971) 21 Cal.App.3d 902,909.)

Here, the jury awarded plaintiff \$212,450 in economic damages. The evidence at the time of trial showed that plaintiff was unhappy regarding the mortgage he obtained to purchase the life insurance policy. He stated that he had incurred \$100,000 in interest on the mortgage. (See Tarango Decl., ¶ 7.) Plaintiff also sought damages for the mortgage fees he claimed he incurred in obtaining the loan in the amount of \$10,000. Neither of these numbers, i.e., the interest paid and the loan fees, were evidenced in any document offered by plaintiff. Both numbers were plaintiff's best estimate only.

Plaintiff sought as damages, the interest and loan fees for the entire \$500,000 plus loan he obtained to not only **finance** the first \$250,000 premium on the Allianz life insurance policy, but also to generate cash for other purposes, including making cash gifts to his children and other investments unrelated to the purchase of the insurance policy. As a result, plaintiff was awarded damages by the jury for fees and costs that were not the responsibility or caused by defendant. Therefore, the damages awarded to plaintiff were excessive.

IX. THE COURT MAY CONDITION AN ORDER GRANTING A NEW TRIAL ON THE PLAINTIFF ACCEPTING A REMITTITUR

Code of Civil Procedure section 662.5 subdivision (b) states that where it would be proper to grant a new trial solely on the ground of excessive damages, the trial court may "make its order granting the new trial subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consents to a reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable." Therefore, if the court conditions its granting of a new trial on the plaintiff accepting a reduction in the award of economic damages, the court should significantly reduce that award.

X. CONCLUSION

Based upon the facts at trial and the law, an error occurred as a matter of law in including "undue influence" on the Special Verdict Form and instructing the jury as to "undue influence" resulting in a miscarriage of justice. Additionally, plaintiff failed to present evidence sufficient to support the jury verdict holding defendant liable for **Financial Elder Abuse**. Further, the jury's award of \$ 212,450 in economic damages was excessive. Therefore, for the reasons set forth above and in defendant's notice of intention to move for a new trial, defendant respectfully requests that the court grant this motion and order a new trial as to the **Financial Elder Abuse** claim and damages.

DATED: September 23, 2010

LEWIS BRISBOIS BISGAARD & SMITH LLP

By <<signature>>

Peter L. Garchie

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Footnotes

- 1 Plaintiff testified that he still owns the Allianz annuities, but only recently has he become unsatisfied with their performance. During his deposition earlier in the litigation, he testified that he was happy with the Allianz annuities. During trial, he confirmed it was his plan to leave the money in the annuities and not take the money out until maturity. (Tarango Decl., ¶ 37.)

- 2 Plaintiff's expert Dan Valdes testified, he received commissions for the sale of the plaintiff's prior annuities. He did not disclose to plaintiff the amount of his commissions, because insurance agents are not required to disclose their commissions. (Tarango Decl., ¶ 49.) Additionally, Witness Richard Lindsay, testified that the annuities and the life insurance were suitable investments for plaintiff and that the commissions received by Defendant were in line with industry standards. (Tarango Decl., ¶¶ 52.)
- 3 Plaintiff's expert Dan Valdes testified he sold the same Allianz annuities to seniors over 70 years old. (Tarango Decl., ¶ 49.) He admitted to using seminars to get new clients and his target group for marketing purposes was people over 50 with assets, same as Defendant. (Tarango Decl., ¶ 49.)
- 4 Plaintiff's expert Dan Valdes testified he sold the same Allianz annuities to seniors over 70 years old. (Tarango Decl., ¶ 49.) He also testified that he received commissions for the sale of the plaintiff's prior annuities, which were not disclosed to plaintiff because insurance agents are not required to disclose their commissions. (*Id.*) Additionally, Witness Richard Lindsay, testified that the annuities and the life insurance were suitable. (Tarango Decl., ¶ 52.) Investments for plaintiff and that the commissions received by Defendant were in line with industry standards. (Tarango Decl., ¶¶ 49, 52.)

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